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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC;
LOCAL 922, UNITED STEELWORKERS OF AMERICA;
and CHARLES A. ROYSTER,
Petitioner,

v.

BANDAG, INCORPORATED,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may refuse to enforce an arbitration award, where the arbitrator finds that the employer's discharge of an insubordinate employee violates the contractual just cause provision and remedies the violation by reinstating the employee but with a thirty day suspension, on the grounds that an employer promulgated work rule is incorporated into the collective bargaining agreement as a matter of law and that the arbitrator's reinstatement remedy contradicts the plain language of the insubordination work rule which calls for discharge.

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PETITION FOR A WRIT OF CERTIORARI

The United Steelworkers of America, AFL-CIO-CLC, its Local 922 ("Union") and Charles A. Royster, Sr. respectfully petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Bandag Inc. v. Local 922, United Steelworkers of America, et al.*, No. 97-1106 (4th Cir. 1997).

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced as Appendix A (1a-2a). The Order of the court of appeals denying the petition for rehearing with suggestion for rehearing *en banc* is reproduced as Appendix D (30a). The opinion of the district court is unreported and is reproduced as Appendix B (3a-14a). The

Award issued by Arbitrator Jack Clarke is unreported and is reproduced as Appendix C (15a-29a).

JURISDICTION

The court of appeals entered its judgment on August 5, 1997. App. 1a. A timely Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on September 2, 1997. App. 30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction over this case under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) ("Section 301"). The court of appeals had jurisdiction of this case pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISION INVOLVED

Section 301 provides, in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

Respondent Bandag Incorporated ("Company") and petitioner Union were signatories to a collective bargaining agreement ("1995 Agreement"), which covered the production and maintenance employees employed by the Company at its retread tire plant in Oxford, North Carolina. App. 17a. The 1995 Agreement contained a grievance and arbitration provision, Article 17 "Dispute Resolution." App. 17a. The 1995 Agreement provided, in Article 18, that the Company has the authority to discharge employees "for just cause." App. 17a. The 1995 Agreement also provided that the "arbitrator selected must interpret and apply this agreement only." App. 12a.

The 1995 Agreement contained no work rules, but Article 18 stated that the Company "will develop and post written work rules . . . ." App. 17a. The Company promulgated a document entitled, "Bandag Incorporated Work Rules and Safety Regulations," which stated that "[i]ncidents such as the following shall be considered violations constituting just cause for discharge: . . . Insubordination . . . ." App. 18a.

A just cause for discharge dispute arose between the Company and the Union in May of 1995. App. 20a. On May 25, 1995, the grievant reported having received foreign matter in his eye. App. 20a. The grievant was driven by production superintendent Kevin Willsie to the doctor's office where his eye was treated. App. 20a. Willsie then drove the grievant to a hospital to obtain a urine sample for a drug test, pursuant to the Company's practice of having a drug test performed when an employee was involved in an on-the-job accident. App. 20a. They arrived at the hospital around 12:30 p.m. App. 20a. The grievant refused to repeated requests to provide a urine sample, stating that he could not provide one. App. 20a-21a. He declined to drink any water, except for one or two sips. App. 21a. The grievant did offer to provide a blood or hair sample for drug testing, but after checking with the nurse, Willsie told the grievant that only urine samples were authorized. App. 21a. Willsie also told the grievant that continued refusal to give a sample might be considered insubordination and place grievant's job at risk. App. 21a. After being talked to by another supervisor and after having eaten, the grievant provided the sample shortly after 3:30 p.m. App. 21a. The sample tested negative. App. 21a.

Later that evening, the Company decided to suspend the grievant, and on May 26, 1995, the Company discharged him for insubordination. App. 21a. Pursuant to the terms of the 1995 Agreement, the Union filed a grievance challenging the grievant's discharge. App. 15a. The Company denied the grievance, and the Union filed for

arbitration. App. 16a. Using the services of the American Arbitration Association, the Company and the Union selected Jack Clarke as the arbitrator. App. 16a.

The Company and the Union stipulated that the following issue was to be resolved in arbitration:

> [W]hether the discharge of the Grievant was for just cause and, if not, what should the remedy be. App. 16a.

Arbitrator Clarke issued an opinion and award on May 2, 1996. App. 15a. He held that "where, as in the present case, an employer's right to discharge an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the discharge of an employee was for just cause." App. 25a. The Arbitrator found that the grievant had been insubordinate in failing for over two hours to provide a urine sample but that the Company nevertheless lacked just cause for discharge. App. 27a-28a. The Arbitrator's conclusion that the Company lacked just cause for discharge was based on two factors: first, that the grievant did provide the requested urine sample while the Company was still continuing its efforts to convince him to do so; and, second, that the grievant's participation in legitimate union activities was among the factors considered by the Company in its decision to discharge him. App. 28a. Arbitrator Clarke held that the grievant's insubordinate conduct was serious and warranted a thirty-day suspension without pay; for a remedy, the Arbitrator directed the Company to reinstate the grievant to his former job with full seniority and to make him whole for all time and benefits lost as a result of his discharge except for the first thirty days. App. 28a-29a.

The Company sued to vacate the Award, and the Union counterclaimed seeking enforcement. Acting on cross motions for summary judgment, the district court vacated the arbitration award, relying exclusively on an earlier court of appeals' decision, *Mountaineer Gas Co.*

v. Oil, Chemical & Atomic Workers Int'l Union, 76 F.3d 606 (4th Cir. 1996), *cert. denied*, —— U.S. ——, 117 S.Ct. 80 (1996). *Mountaineer Gas* was a case where the employer had discharged an employee who tested positive for drugs in violation of a company-promulgated policy which called for discharge but where the arbitrator had reinstated the employee, finding that the discharge violated the proper cause for discharge provision of the labor agreement in that the employee had an unblemished work record. The court of appeals upheld the vacating of the award in *Mountaineer Gas*, and the district court in the instant case quoted from that decision, as follows:

> "[W]e find that the Drug Policy was to be interpreted and enforced in accordance with the CBA. A valid and proper policy promulgated by a [sic] employer pursuant to a collective bargaining agreement is enforceable. . . .
>
> The CBA gave Mountaineer the requisite authority to enforce the Drug Policy and to discharge Watson for violating [it]. The arbitrator's role clearly prohibited him from amending, adding to, or subtracting from the CBA. Therefore, by converting Watson's permanent discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, the arbitrator blatantly ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that appealed to his own notions of right and wrong. . . . [T]he words 'proper cause' of the CBA cannot be the loophole through which the arbitrator bypasses the Drug Policy's mandatory language to implement his own brand of industrial justice. . . . *Id.* at 909-10." App. 9a-10a.

The district court in the instant case held that *Mountaineer Gas* was controlling. App. 10a. The district court noted that the Company had adopted Work Rules which specified that certain incidents, including insubordination, " '*shall be considered violations constituting just cause for discharge* . . . .' " App. 11a (emphasis in the original).

The district court also noted that "the arbitrator found that [the grievant's] conduct constituted insubordination." App. 12a. The district court concluded that the Award must be vacated, as follows:

> In reinstating [the grievant], the arbitrator created an exception to Bandag's policy of discharge for insubordination. The award thus fails to draw its essence from the CBA and cannot be enforced. App. 13a.

On appeal, the court of appeals affirmed *per curiam*, stating:

> In vacating the award, the district court relied specifically on our decision in *Mountaineer Gas Co.* . . . in which we recognized that a valid and proper policy promulgated by an employer pursuant to a collective bargaining agreement is enforceable even if the rule is not specifically incorporated by reference into the agreement.
>
> . . . . Like the district court, we agree that this case is controlled by our decision in *Mountaineer Gas Company*. We therefore affirm on the reasoning of the district court. App. 2a (citation omitted).

The Union's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied by the court of appeals. App. 30a.

REASONS FOR GRANTING THE PETITION

The circuit courts are clearly split on their understanding of what significance company-promulgated work rules have in relation to mutually agreed upon just cause provisions and what the judicial role is in determining that significance. The court of appeals below has established a *judicially-determined, per se* rule of contract interpretation: non-negotiated company work rules promulgated pursuant to a management rights provision in the collective bargaining agreement will have the full force and effect of bargained-for contractual language. This means

that, as a *matter of law* in the Fourth Circuit, arbitrators who find employees guilty of even the most technical violations of work rules calling for discharge are precluded from reinstating an employee under a just cause provision of the collective bargaining agreement, even though the penalty does not fit the crime or even if the company is guilty of disparate treatment or discrimination. In establishing this per se rule of contract interpretation, the court of appeals below has placed itself squarely in conflict with other circuits, which have held that it is the province of the *arbitrator* to determine the role of company-promulgated work rules and that if a company wants the unequivocal right to discharge free of arbitral just cause principles, the company must negotiate that right into the contract.

This split involving the court of appeals below raises the issue of a broader circuit split over the degree of judicial deference which must be given to an arbitrator's determination that just cause for discharge is lacking, despite contractual language purporting to give an employer the unequivocal right to discharge under certain circumstances. At base, the split concerns which adjudicator, the arbitrator or the court, decides what a contract, taken as a whole, contemplates in the context of discharge and discipline.

The need for guidance from this Court on these issues is acute and of serious import.

I. THE COURT OF APPEALS' DECISION BELOW IS SQUARELY IN CONFLICT WITH DECISIONS ISSUED BY THE SECOND, SIXTH, AND EIGHTH CIRCUITS AND AGGRAVATES AN ALREADY CONFUSED AND DISCORDANT AREA OF JUDICIAL PRECEDENT

In *United Paperworkers v. Misco*, 484 U.S. 29, 39 (1987), this Court held that the Fifth Circuit was not free to find, in the face of an arbitrator's contrary evidentiary determination, that an employee had violated a

company work rule. This Court noted that, "[e]ven if it were open to the Court of Appeals to have found a violation of Rule II.1 . . . the question remains whether the court could properly set aside the award because in its view discharge was the correct 'remedy.' ":

> Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel,* for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*" 484 U.S. at 41 (emphasis in original).

This Court acknowledged that the parties to the collective bargaining agreement "may limit the discretion of the arbitrator in this respect" but that before "disposing of the case on the ground that Rule II.1 had been violated and discharge was therefore proper, the proper course would have been remand to the arbitrator for a definitive construction of the contract in this respect." 484 U.S. at 41-42.

The court of appeals in its decision below and in *Mountaineer Gas* has established that "definitive construction" as a matter of law for all labor agreements within its jurisdiction by holding that non-negotiated work rules promulgated under a management rights clause are incorporated into the labor agreement. This means that, within the Fourth Circuit, an arbitrator is precluded from applying well-settled arbitral principles under a contractual just cause provision to fashion a remedy short of discharge once the arbitrator has found a violation of a rule which calls for discharge. Simpy put, within the Fourth Circuit alone, an arbitrator is precluded in such work rule violation cases from determining whether the punishment fits the crime, whether the employee was accorded

due process, or whether the company has engaged in disparate treatment or discrimination.

In establishing the rule of law that company-promulgated work rules are incorporated into the collective bargaining agreement, the court of appeals has placed itself in direct conflict with other circuits. Indeed, the Second Circuit rejected the court of appeals' reasoning on this issue in a recent case which also turned on the relationship between company-promulgated work rules and an arbitrator's authority to engage in a just cause analysis despite having found a violation of the rules. See *First National Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338,* 118 F.3d 892 (2d Cir. 1997). In that case, as here, the work rules were promulgated pursuant to a management rights provision in the collective bargaining agreement and listed certain acts that "*constitute just cause* for immediate dismissal." 118 F.3d at 894 (emphasis in original). There, as here, the arbitrator determined that the employee had violated the work rules but that the company nevertheless did not have just cause for discharge. On appeal, the Second Circuit enforced the award, stating that "where the CBA authorizes the arbitrator to resolve disputes concerning the interpretation or application of its terms, it remains for the arbitrator to determine whether a discharge was for 'just cause.'" 118 F.3d at 896. In so holding, the Second Circuit reasoned as follows:

> If [the company] wished to have an unquestionable right to discharge an employee for any specified conduct, it needed to negotiate for recognition of that right in the CBA. 118 F.3d at 896.

In reaching this conclusion, the Second Circuit specifically discussed and rejected the court of appeals' reasoning on the issue. First, the Second Circuit recounted the holding in *Mountaineer Gas,* as follows:

> [The company] relies heavily on *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union*

> . . . which held that "when the collective bargaining agreement reserves to management the right to make and enforce disciplinary rules, any rules or policies promulgated in accordance with that authority are thus incorporated into the collective bargaining agreement and have the force of contract language." 118 F.3d at 896-97 (citation omitted).

Next, however, the Second Circuit noted that the rule of law set forth in *Mountaineer Gas* was based on a Fifth Circuit case involving a collective bargaining agreement which, unlike that in *First National,* specifically limited the authority of an arbitrator in disciplinary matters. As the Second Circuit explained:

> But the court in *Mountaineer Gas* drew this rule of law from *General Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Services,* 838 F.2d 794, 796 (5th Cir. 1988), which involved a collective bargaining agreement whose "management rights" clause . . . . stated that "[t]he only question which may be the subject of a 'grievance' is whether or not the disciplined employee did or did not engage in the specific conduct which resulted in the disciplinary action." 118 F.3d at 897.

Thus, the collective bargaining agreement in the Fifth Circuit case specifically limited the arbitrator to determining only whether an employee was guilty of the conduct charged and not whether the employee was disciplined for just cause. The agreement in *First National* did not so limit the arbitrator (nor, we add, did the agreements below and in *Mountaineer Gas*). Accordingly, the Second Circuit concluded: "We will *not apply the rule set forth in Mountaineer Gas* to the provisions of this CBA." 118 F.3d at 897 (emphasis added).

The decision of the court of appeals below also conflicts with a Sixth Circuit decision holding that it is for the arbitrator to determine the effect of work rules on just cause. See *The Hoover Company v. Local 1985, Inter-*

national Brotherhood of Electrical Workers, No. 95-4125 (6th Cir. Dec. 27, 1996) (Opinion not recommended for full-text publication pursuant to Sixth Circuit Rule 24). App. 31a. As in the instant case, the collective bargaining agreement in *Hoover* contained a provision permitting discharge for "proper cause" and a management rights provision authorizing the company to promulgate work rules. App. 32a. An employee there was discharged for violating one of the work rules, but the arbitrator reinstated the employee after finding no just cause for discharge. On appeal, the company argued that the "proper cause" provision did "not apply to the case at bar because the arbitrator's authority under the CBA was limited to application of Rule 18's more specific penalty of discharge." App. 32a. The Sixth Circuit enforced the award, however, reasoning as follows:

> As the parties' arguments reflect, the penalty for violation of Rule 18 and the proper cause provision are susceptible to differing interpretations as to whether the arbitrator may review sanctions imposed by Hoover for work rule violations. The arbitrator possesses exclusive authority to resolve this contractual ambiguity. App. 33a-34a.

The Sixth Circuit concluded that, "even assuming that the arbitrator found a Rule 18 violation . . .," the "arbitrator's award simply did not exceed the scope of his authority." App. 34a.

Finally, the rule of law established by the court of appeals below conflicts with the law in the Eighth Circuit. As in the instant case, the collective bargaining agreement in *Midwest Coca-Cola Bottling Co. v. Allied Sales Drivers, Local 792,* 89 F.3d 514 (8th Cir. 1996), contained a provision requiring just cause for discharge as well as a management rights provision giving the company the right to promulgate work rules. The arbitrator there found that an employee had violated a work rule calling for discharge but that the company did not have just cause for discharge.

On appeal, the company argued that "the arbitrator could not order it to reinstate [the employee] because the Agreement permits it to make and enforce work rules and that it properly discharged [the employee] under those rules." 89 F.3d at 517. However, the Eighth Circuit rejected the company's argument "because it fail[ed] to consider the entirety of the applicable contract provisions." 89 F.3d at 517. As the Eighth Circuit explained:

> Under the Agreement, the arbitrator was entitled to decide that Coca-Cola did not have just cause to discharge [the employee], and to order Coca-Cola to reinstate [him]. Insofar as there was tension between the right to enforce work rules specifying discharge, and to discharge only for just cause, these were issues to be resolved by the arbitrator. 89 F.3d at 518.

The Eighth Circuit concluded: "Coca-Cola's argument, at the core, is that the work rules trump the Agreement. We reject this argument." 89 F.3d at 519.

In sum, the court of appeals decision below—which applies the *Mountaineer Gas* rule of law that non-negotiated work rules promulgated by the company pursuant to a management rights clause are incorporated into the collective bargaining agreement and carry the force of bargained-for contractual language—is in direct conflict with law in the Second, Sixth, and Eighth Circuits. This split is of serious import because the court of appeals has not issued a limited, contract-specific holding. Instead, the court of appeals has established, as a rule of law, that *all* collective bargaining agreements in the Fourth Circuit that contain management rights clauses incorporate company work rules; by judicial decree, *all* company work rules in the Fourth Circuit have the full force and effect of bargained-for contractual language. The fact that the Fourth Circuit *alone* has established this per se rule of contract interpretation has serious implications for arbitrators, for the federal judiciary, and for unions and employers who engage in collective bargaining, especially in a multi-plant setting.

We discuss the serious problems introduced by the court of appeals' decision below, but we note here that the split generated by the court of appeals aggravates an already conflicting and confused area of judicial precedent. This Court in *Misco* held that an "arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." 484 U.S. at 38. The circuit courts are squarely split on their interpretation of this passage, particularly when it comes to reviewing arbitration awards reinstating employees on grounds that there was no just cause for discharge. Tension exists in many collective bargaining agreements between provisions purporting to call for discharge in certain circumstances and provisions requiring that discharge be for just cause. The Courts of Appeals for the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits have held that it is for the arbitrator to resolve these tensions and to determine whether a just cause analysis is proper under the terms of a collective bargaining agreement and under the circumstances of discharge.[1] However, the Courts of Appeals for the First, Fourth, Fifth and Eleventh Circuits have held that if a contractual provision calls for discharge, the "plain language" of that

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[1] See e.g., *Local 238 Teamsters v. Cargill, Inc.*, 66 F.3d 988 (8th Cir. 1995); *Northwest Airlines v. Air Line Pilots Ass'n Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *Alhambra Foundry Co. v. General Warehousemen's Union*, 687 F.2d 287 (9th Cir. 1982); *Timken Co. v. Steelworkers*, 492 F.2d 1178 (6th Cir. 1974); *International Ass'n of Machinists, Dist. No. 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969), *cert. denied*, 369 U.S. 820 (1969); *Campo Machining Co. v. Local Lodge No. 1926, Machinists*, 536 F.2d 330 (10th Cir. 1976); *Local 453, Int'l Union of Electrical Workers v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963), *cert. denied*, 373 U.S. 949 (1963).

provision controls and hence nullifies contractual provisions requiring just cause for discharge.[2]

Thus far, this Court has declined to grant *certiorari* on this issue, perhaps because respondents' briefs in opposition have often claimed that there is no split and that any apparent differences in circuit court opinions are due to differences in the underlying collective bargaining agreements. It is true that there is great diversity among collective bargaining agreements, accounting perhaps for some of the differences seen at the level of circuit court opinion; nevertheless, the widely varying rate at which different circuits enforce arbitration awards cannot be explained merely by reference to contractual differences. Rather, the wide variance in the enforcement rate, from a high of 82.1 percent to a low of 54.5 percent, strongly suggests that there is a circuit split concerning the amount of deference due arbitration awards.[3]

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[2] See e.g., *Warrior & Gulf Navigation Co. v. United Steelworkers*, 996 F.2d 279 (11th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1834 (1994); *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990); *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir. 1988); *Textile Workers Union of America v. American Thread Co.*, 291 F.2d 894 (4th Cir. 1961).

[3] The data upon which we make this assertion comes from a study performed by Michael H. LeRoy and Peter Feuille, published in 1992. The study examined how the federal courts have responded to *Trilogy*-type claims over a thirty-year period looking at 1,636 district and circuit court decisions involving arbitration appeals. This study is the most comprehensive examination of what federal courts have done in this area published to date, and the number of cases examined provides, as the authors note, a strong empirical foundation upon which to assess the federal courts' responses to arbitration appeals. During the period from 1960 to 1991, the rate at which the different circuits have enforced awards ranged from a high of 82.1 percent to a low of 54.5 percent (the Fourth Circuit ranked second to last, at 61.5 percent). The authors of the study are careful to note that, because the number of decisions in some of the circuits is not large, these percentages should be inter-

Space considerations prevent a comprehensive account of this split. Thus, while we refer this Court to the many cases footnoted, we discuss only two cases which serve to provide a more concrete characterization of the split, *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3282 (U.S. Oct. 14, 1997) (No. 97-95); and *Bruce Hardwood Floors v. Southern Council of Industrial Workers, Local Union 2509*, 8 F.3d 1104 (6th Cir. 1993). The two cases involve the same company, locals of the same union, similar collective bargaining agreements, and strikingly parallel fact situations. Sheila Dixon and Mary Scarbrough were both found by an arbitrator to have violated a contractual provision calling for discharge and were both reinstated under a contractual provision requiring that discharge be for just cause. The company in both cases sued to vacate the award; however, on review by the Fifth and Sixth Circuits, respectively, the outcomes of these cases diverged. The Fifth Circuit vacated the award before it, holding that the arbitrator ignored the plain language of the contract in considering whether the discharge was for just cause: "[O]nce the arbitrator found [a violation], he was bound to impose the penalty provided by the CBA for that conduct." 103 F.3d at 452. The Sixth Circuit, however, enforced the award, rejecting the argument that once the company "established [a violation], it necessarily

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preted cautiously. However, at the district court level, where enough cases have been decided within each circuit to make resulting differences statistically significant, the rate of enforcement only confirms the variance at the circuit court level, ranging from a high of 81.0 percent for district courts located in the Second Circuit to a low of 47.4 percent for district courts located in the Eleventh Circuit (district courts located in the Fourth Circuit ranked fourth to last, at 60.5 percent). See Michael H. LeRoy & Peter Feuille, *The* Steelworkers Trilogy *and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78, 103-05 (1992).

established just cause for dismissal." 8 F.3d at 1107. Instead, the Sixth Circuit found that the arbitrator did not ignore the plain language of the contract in requiring the company "to inquire whether a certain offense, in light of the circumstances, met the substantive requirements of just cause for discharge." 8 F.3d at 1107. Sheila Dixon and Mary Scarbrough both belonged to the same union, worked for the same company, and worked under similar collective bargaining agreements. They both violated a contractual provision calling for discharge and were both found by the arbitrator to have been discharged without just cause. True, there were differences in the collective bargaining agreements under which they worked, but the divergence in the outcome of their cases is not a result of these differences. Rather, the divergence reflects a fundamental split in judicial philosophy concerning arbitration, and the fact that Sheila Dixon lived in Texas and Mary Scarbrough in Tennessee.

The court of appeals is clearly aligned with the Fifth Circuit on this broader split.[4] The Fourth Circuit has over the years consistently shown itself willing to determine, against the arbitrator, what constitutes contractual plain language and to vacate awards as not drawing their essence from the collective bargaining agreement. Indeed, the Fourth Circuit has earned special mention by Elkouri & Elkouri in this respect:

> The Fourth Circuit, in particular, uses the "essence standard" . . . as the legal means to set aside awards with which it disagrees. Elkouri & Elkouri, How Arbitration Works 38 (5th ed., 1997).

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[4] In fact, the authors of the study on federal courts' enforcement of arbitration awards have noted that some circuits have "exhibited a very strong record at . . . enforcing awards" but that "other circuits, such as the Fourth and Fifth, have demonstrated much less support for arbitration." The authors conclude that "the lower courts' application of the *Trilogy* is far from uniform across the country." LeRoy & Feuille, *supra* note 3, at 118.

Moreover, now that the court of appeals has as a matter of law brought company-promulgated work rules into the contract, and hence, added a weapon to the judicial "plain language" arsenal, the court of appeals has created for itself a scope of review that is so out of step with other circuits and this Court as to be virtually unrecognizable under the standard set forth in the *Trilogy* and *Misco*. This Court must address the circuit split generated by the decision below, as well as the broader split which it exacerbates.

II. THE QUESTION PRESENTED IS IMPORTANT

This Court has repeatedly acknowledged the significance of grievance arbitration to the stability and health of union-management relationships, and this Court has repeatedly emphasized that judicial deference is necessary for the system of grievance arbitration to operate. See, e.g., *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); *United Paperworkers v. Misco*, 484 U.S. 29 (1987). Nevertheless, even a brief look at the scholarly literature on the issue will reveal that various circuits, while paying lip service to the holding of the *Trilogy*, are consistently vacating arbitration awards with which they disagree.[5] This Court again addressed this issue in *Misco*, which seemed to resolve definitively the question of the deference which the judiciary must give to

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[5] See, e.g., David E. Feller, *Presidential Address: Bye Bye* Trilogy, *Hello Arbitration, in* Arbitration 1993: Arbitration and the Changing World of Work 1 (Gladys W. Gruenberg ed., 1994); Susan A. Fitzgibbon, *The Judicial Itch*, 34 St. Louis U.L.J. 485 (1990); Douglas E. Ray, *Protecting the Parties' Bargain After* Misco: *Court Review of Labor Arbitration Awards*, 64 Ind. L.J. 1 (1988).

arbitration awards. However, our experience indicates that the number of arbitration awards vacated by the courts has shown no sign of abating subsequent to *Misco*, and, indeed, the Fifth Circuit post-*Misco* has approvingly noted, in *Delta Queen Steamboat*, "an emerging trend" among the circuits of vacating awards under "plain language" scrutiny. 889 F.2d at 604. The circuit courts are now firmly split as to their understanding and application of the *Trilogy* and *Misco*, specifically when it comes to review of arbitration awards reinstating discharged employees. Sadly, it appears that this Court must again address this issue in order to bring the circuits in harmony with each other.

First, it is important that we provide some background for the context under which arbitration awards are appealed and vacated. Briefly, employees, and the unions that represent them, lose half of the discharge cases taken to arbitration.[6] The vast majority of legal challenges to arbitration awards, however, are employer-driven, either because the employer has sued to vacate or because the employer has refused to comply with the award, thereby forcing the union to sue to enforce the award.[7] Moreover, courts are significantly more likely to vacate an award favoring a union than an award favoring an employer: The circuit courts overturned 33 percent of union-favorable awards but only 13 percent of employer-favorable awards.[8] This means that an employer unhappy with an arbitration award has a one in three chance of having that award overturned at the circuit court level. While

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[6] See Ken Jennings, Barbara Sheffield & Roger Wolters, *The Arbitration of Discharge Cases: A Forty-Year Perspective*, 33, 36 (January, 1987 Lab. L.J.).

[7] See Peter Feuille, Michael LeRoy & Timothy Chandler, *Judicial Review of Arbitration Awards: Some Evidence* 477, 480 (August, 1990 Lab. L.J.).

[8] *Id.* at 482.

it is true that still only a small number of arbitration awards are appealed to the courts, at the circuit court level in particular, as LeRoy and Feuille note, "the growing body of judicial precedent might encourage additional appeals over time. Although reluctant parties lose most of their court appeals, the possibility of prevailing in court appears sufficient to encourage these appeals to continue." Peter Feuille and Michael LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 Arb. J. 35, 47 (1990).

The significance of this problem is difficult to overstate. First, as Professor and Arbitrator Theodore St. Antoine has noted:

> Arbitration, with its attendant safeguards against arbitrary action by management, may well be collective bargaining's greatest contribution to the welfare of American working people—even more than the economic gains secured by union contracts. Theodore J. St. Antoine, *The Law of Arbitration, in* Labor Arbitration under Fire 1, 40 (James L. Stern & Joyce M. Najita eds., 1997).

Furthermore, employee discharge and discipline cases represent the most frequent type of grievance taken to arbitration,[9] and awards reinstating discharged employees are the ones most frequently vacated by the courts.[10] Finally, discharge represents, as Elkouri and Elkouri note, "the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake." Elkouri & Elkouri, How Arbitration Works 905 (5th ed. 1997). Consistent judicial vacation of awards reinstating employees has dire consequences for the individual employees who lose their jobs as a result

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[9] See Jennings, Sheffield & Wolters, *supra* note 6, at 33.

[10] See Clyde W. Summers, *The* Trilogy *and Its Offspring Revisited: It's a Contract, Stupid*, 71 Wash. U.L.Q. 1021, 1049 (1993).

of this judicial intervention as well as for the job security of employees generally.

This consistent judicial intervention also has dire consequences for the federal judiciary. When a federal judge vacates an award issued by a neutral arbitrator, that federal judge is viewed necessarily by employees as having taken the employer's side in that labor dispute. This perception of partisanship is exacerbated when it is a neutral arbitrator's award finding a lack of just cause for discharge that a court has vacated. This is so because just cause is the employees' contractual bulwark against arbitrary imposition by their employer of the extreme industrial penalty of discharge. Repeated judicial intervention in labor disputes on behalf of employers through the issuance of equitable orders against strikes "caused the federal judiciary to fall into disrepute among large segments of this Nation's population." *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 715 (1982). Repeated judicial intervention in labor disputes on employers' behalf by the denial of equitable orders to enforce awards directing the reinstatement of employees found by neutral arbitrators to have been discharged without just cause will only lead to history repeating itself.

At base, courts which routinely vacate these arbitration awards have manifested a fundamental misunderstanding of the nature of "just cause." Just cause is multi-faceted, complex, and so uniquely a part of the context of industrial relations in the United States, that it cannot simply be transported into a judicial context and retain its distinctive properties. Indeed, it is in the context of arbitral determinations of just cause that judges need to be their most deferential, where judicial intuition and expertise might be most inapposite. As Professor and Arbitrator Clyde Summers has noted:

> Awards reinstating discharged employees are the ones most frequently vacated by the courts. It is in these

> cases that evidence of arbitral practice would be most useful, for principles and values commonly used by arbitrators in discipline cases may seem foreign to the judge's experience and practice. Clyde W. Summers, *The* Trilogy *and Its Offspring Revisited: It's a Contract, Stupid*, 71 Wash. U.L.Q. 1021, 1049 (1993).

This Court in *Misco* has already taken note of seven criteria which arbitrators apply in a just cause analysis. 484 U.S. at 368 n.5. The Sixth Circuit may have captured the essence of one of those criterion when it recognized the distinction between "an employee who builds a shack for the purpose of hiding out to sleep and an employee with an unblemished eight-year record who nods off for a few minutes at her work station . . . ." *Bruce Hardwood Floors*, 8 F.3d at 1109. However, the Fifth Circuit held that the arbitrator was precluded from applying any of the just cause criteria in a similar case, see *Bruce Hardwood Floors*, 103 F.3d at 452, and various circuits, including the Fourth Circuit, have followed suit.

This Court in *Misco* articulated a number of "reasons for insulating arbitral decisions from judicial review. . . ." 484 U.S. at 37. These include the policies embodied in the statutes regulating labor-management relations, the mitigation of industrial strife, and the potential for clogging of already crowded federal dockets. These concerns will not be rearticulated here, but we add to them.

The first addition concerns arbitrators and the opinions they write. It should be noted that commercial arbitration awards are very rarely vacated by the courts on grounds that an award is contrary to the terms of the contract and that commercial arbitrators almost never write opinions accompanying their awards, in part, at least, because of the parties' desire to avoid judicial review.[11] Of course, arbitral opinions in the commercial context are not really

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[11] See Feller, *supra* note 5, at 9-10; Fitzgibbon, *supra*, note 5, at 507.

necessary when two parties in a discrete economic relationship wish to resolve a discrete economic dispute. However, as this Court has recognized, labor arbitration awards and opinions are an integral part of an ongoing relationship between the employer and the union which represents its employees, see *Enterprise Wheel*, 363 U.S. at 598. These arbitration awards and opinions are essential to industrial self-government because they not only resolve a particular dispute, but they also serve to guide the parties in a continuing relationship. If labor arbitrators cease to write opinions or if arbitrators are forced to craft their opinions so as to insulate them from judicial review, a critical part of our system of industrial self-government will be lost.

Realistically speaking, an arbitrator hearing a case in the Fourth Circuit will now have a clear incentive to craft his or her opinion so as to avoid judicial interference or, simply, to write no opinion at all. To use the case below as an example, if Arbitrator Clarke had decided, as Justice Douglas said that he might, "to play it safe by writing no supporting opinion[]," *Enterprise Wheel*, 363 U.S. at 598, the Fourth Circuit would have had no basis upon which to quarrel with his reasoning or to vacate his award. This is so because there would be no finding that the grievant was insubordinate. Thus, the award would have been immune had the Arbitrator simply noted "grievance upheld" or had written an opinion finding that the grievant was not insubordinate. The immediate dispute would be resolved in that the grievant would have his job back, but at what cost? Arbitrator Clarke considered the grievant's conduct to be insubordinate, but not to the level, under just cause concepts, that warranted the ultimate industrial penalty of discharge. Thus, if the Arbitrator had written no opinion at all or had crafted his opinion to avoid judicial tampering with the result, the parties would be no wiser as to what arbitrators consider to be insubordinate conduct or, further, what consequences will flow from certain conduct. As

written, the Arbitrator's opinion below sends a clear warning to other employees—refusals to take drug tests promptly will constitute insubordination and will subject employees to serious discipline, including suspension and possible discharge—and sends a message to the Company —not all level of insubordinaiton will warrant discharge and consideration of union activity will taint a discharge. This is the sort of guidance we want arbitrators to provide through their opinions; we do *not* want arbitrators to feel compeled to relinquish so critical a part of their function merely to ensure that the Fourth Circuit, for example, does not interfere with the award. Former labor arbitrator and current circuit court judge, Harry Edwards, makes this argument well:

> The problem with expanded judicial review is not necessarily the threat of "excessive intervention" by the courts. Rather, in my opinion, the potential hazard of judicial review is that it will likely result in arbitrators deciding cases and writing opinions in such a way as to insulate their awards against judicial reversal. As a judge, I have already seen too many cases in which ALJs, agency officials, and judges in lower courts have written opinions with an eye toward appellate review but blind to the heart of the issues before them. Decisions in such cases often parrot appropriate statutory standards, usually in conclusionary terms, but suffer from a lack of reasoned analysis. Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge, in* Arbitration 1982: Conduct of the Hearing 16, 25 (James L. Stern & Barbara D. Dennis eds., 1983).

A further reason to be troubled by the split generated by the court of appeals below and the broader split on judicial deference to arbitration awards, concerns the collective bargaining aspects of labor-management relations. The court of appeals' per se rule of contract interpretation means that collective bargaining agreements in the Fourth Circuit will now, by judicial fiat, operate dif-

ferently than collective bargaining agreements elsewhere. Not only does this split undermine the coherence and effectiveness of our national labor policy, it alo presents serious difficulties for companies and unions which operate and bargain collectively nation-wide. For example, in a single labor agreement which covers plants nationwide, including one in New York and one in Maryland, Bethlehem Steel and this Union have agreed to a permanent umpire who is responsible for the decisions in all arbitration cases. Under the existing split, the eventual result will be that arbitration decisions by the same person involving the reinstatement of employees discharged for violating the same work rule will be enforced by the Second Circuit and vacated by the Fourth Circuit with the differing result preordained by geography and judicial philosophy.

This result is clearly intolerable and cannot be what this Court envisioned in *Misco*, when it stated that federal statutes regulating labor-management relations "reflect a decided preference for private settlement of labor disputes without the intervention of government." 484 U.S. at 37. Nor can it be what was intended by this Court's decision in *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957), "that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." The court of appeals has generated a circuit split which both exemplifies and exacerbates the problem with judicial intervention into the grievance and arbitration system and into labor-management relations more generally. This Court's attention is crucial.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1106

BANDAG, INCORPORATED,
Plaintiff-Appellee,

v.

LOCAL 922, UNITED STEELWORKERS OF AMERICA; UNITED STEELWORKERS OF AMERICA, AFL-CIO LOCAL 6660, AFL-CIO-CLC; CHARLES A. ROYSTER,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh
W. Earl Britt, District Judge—(CA-96-430-BR)

Argued: July 8, 1997
Decided: August 5, 1997

Before HAMILTON and LUTTIG, Circuit Judges, and G. Ross ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

OPINION

PER CURIAM:

This appeal is from the district court's entry of summary judgment in favor of Bandag, Inc. (Bandag), va-

cating an arbitration award ordering reinstatement and awarding back pay to Charles A. Royster, a former employee of Bandag. Royster was discharged after he refused for a period of time to provide a urine sample for a drug test, in violation of Bandag's drug policy. The district court vacated the arbitration award, finding that the award failed to draw its essence from the collective bargaining agreement in effect between Bandag and the labor union representing Royster and other Bandag employees, Local 922, United Steelworkers of America. In vacating the award, the district court relied specifically on our decision in *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Internat'l Union*, 76 F.3d 606 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996), in which we recognized that a valid and proper policy promulgated by an employer pursuant to a collective bargaining agreement is enforceable even if the rule is not specifically incorporated by reference into the agreement. *See id.* at 610.

We have carefully examined the record, the briefs, the arguments of counsel, and the opinion of the district court. Like the district court, we agree that this case is controlled by our decision in *Mountaineer Gas Company*. We therefore affirm on the reasoning of the district court. *See Bandag, Inc. v. Local 922, United Steelworkers of Am.*, No. CA-96-430-BR (E.D.N.C. 1996).

AFFIRMED

APPENDIX B

[Filed Dec. 20, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-430-BR3

BANDAG, INCORPORATED,
Plaintiff,

v.

LOCAL 922, UNITED STEEL WORKERS OF AMERICA; UNITED STEEL WORKERS OF AMERICA, AFL-CIO-CLC; and CHARLES A. ROYSTER,
Defendants.

ORDER

This case is before the court on the parties' cross motions for summary judgment.

I. *Background*

The facts of this case are uncontested. On 25 May 1995, Royster reported having received foreign matter in his eye to his supervisor. (Compl. ¶ 13.) Royster was driven by Kevin Willsie, production superintendent, to a doctor's office where Royster's eye was treated. (*Id.*) Willsie then drove Royster to a hospital to obtain a urine sample for a drug test. (*Id.*) In doing so, Willsie followed Bandag, Incorporated's ("Bandag") standard practice of having a drug test performed when an employee is involved in an on-the-job accident or suffers a workers' compensation injury. (*Id.*)

Willsie and Royster arrived at the hospital aound 12:30 p.m. (*Id.* ¶ 14.) Royster refused to provide a urine specimen stating that he could not provide one. (*Id.*) He refused to try to urinate or to drink any water other than one or two quick sips. (*Id.*) Royster repeatedly refused requests by Willsie and Bandag's other supervisors to provide a urine sample despite being advised that failure to provide a sample would constitute insubordination and a violation of Bandag's Work Rules and Safety Regulations ("Work Rules") as well as its Substance Abuse Policy ("SAP") and that Royster could be discharged for such violations. (*Id.*) Royster finally agreed to give the sample at about 3.30 p.m. (*Id.* ¶ 15.) The sample was negative for all drugs tested. (*Id.*)

Later, Bandag discharged Royster for insubordination due to his delay in providing the urine sample. (*Id.* ¶ 16.) Pursuant to the terms of a collective bargaining agreement ("CBA") between Royster's union and Bandag, defendants filed a grievance challenging Royster's discharge. (*Id.* ¶ 17.). Bandag denied the grievance and defendants filed for arbitration. (*Id.*) In his opinion, the arbitrator found that Royster had been insubordinate. (*Id.* ¶ 19.) The arbitrator also found, however, that because Royster eventually provided the sample and because the arbitrator believed Bandag considered Royster's union activities in its decision to discharge him. Bandag lacked just cause for the discharge. (*Id.* ¶ 20.) The arbitrator ordered Bandag to reduce Royster's discharge to a thirty-day suspension, reinstate Royster to his former job with full seniority, and make Royster whole for all time and benefits lost as a result of his discharge except for the first thirty days. (*Id.* ¶ 21.) Bandag instituted this lawsuit challenging the arbitrator's decision. The instant summary judgment motions followed.

II. *Summary Judgment Standard*

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate where there are no genuine issues as to any

material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Fourth Circuit has articulated the summary judgment standard as follows:

> A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 248 (1986)]. In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *Id.* at 255. The plaintiff is entitled to have the credibility of all his evidence presumed. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, [498 U.S. 1109 (1991)]. The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, [477 U.S. 317, 325 (1986)]. The opposing party must demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. *Anderson*, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. *Id.*

Patterson v. McLean Credit Union, 39 F.3d 515, 518 (4th Cir. 1994) (quoting *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 67 (1994), 115 S. Ct. 68 (1994)).

III. *Discussion*

A. *Statute of Limitations*

Defendants argue that Bandag's action is untimely under N.C. Gen. Stat. § 95-36.9(c). Section 95-36.9(c) provides that a party against whom an arbitration award has been issued must file suit challenging the award within 10 days after receiving written notice of such award. Bandag received notice of the arbitrator's decision on 8

May 1996, (Case Aff. ¶ 3), and filed its complaint on 20 May 1996. May 18th was a Saturday. May 19th was a Sunday. Bandag's action, therefore, is timely. N.C. Gen. Stat. § 1-593; *id.* § 1A-1, Rule 6(a).

B. *The Fourth Circuit's Mountaineer Decision*

Defendants argue that under the Fourth Circuit's decision in *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers International Union*, 76 F.3d 606 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996), the arbitrator's decision must be vacated. In that case, Mountaineer Gas Company ("Mountaineer") terminated Donald Watson's employment after he failed to pass a random drug test. *Id.* at 607. Watson challenged his discharge and his complaint went to arbitration. *Id.* The arbitrator reinstated Watson without back pay and converted Watson's permanent discharge into a disciplinary suspension. *Id.* Mountaineer filed suit seeking to vacate the award and alleging that it contravened public policy and failed to draw its essence from the collective bargaining agreement. *Id.*

The Fourth Circuit began its analysis of the case by noting:

> In labor arbitration cases, it is recognized that a reviewing court generally defers to the arbitrator's reasoning. And, absent any fraud by the parties or dishonesty by the arbitrator, an arbitrator's findings should never be overturned. After all, the parties to a collective bargaining agreement bargained for the arbitrator's interpretation and resolution of their dispute.

Id. at 608 (citations omitted). The court continued: "Yet, we acknowledge that arbitration awards may be overturned if the award violates well-settled and prevailing public policy, fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's

own notions of right and wrong." *Id.* To determine whether any of these conditions existed, the court explained that it must examine the business Mountaineer engages in, the regulations it must abide by, its operating procedures and policies, the parties to the collective bargaining agreement, and the arbitration award. *Id.* "Above all," the court stated, "we must determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it." *Id.* The court continued:

> When determining whether the arbitrator did his job, this court examines: (1) the arbitrator's role as defined by the CBA; (2) whether the award ignored the plain language of the CBA; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the CBA's proscribed limits. As summarized by the Supreme Court:
>
> > [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

Considering the relevant factors, the court noted that the bargaining agreement contained a management rights provision [1] and an arbitration clause; the latter clause

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[1] The provision stated:

> It is agreed that there shall be no hindrance or interference with the Management of the Company in its several depart-

stated that the arbitrator shall limit his decision to the issue submitted by the parties and "shall have no authority to amend, add to, or subtract from this Agreement." *Id.* It also noted that as a public utility, Mountaineer was required to abide by the 1988 Drug Free Work Place Act and the Department of Transportation Pipelines Regulations requiring that certain pipeline facility operators test employees for the presence of prohibited drugs and provide an employee substance abuse assistance program. *Id.* at 608-09. In response to these mandates, Mountaineer instituted an alcohol and drug abuse policy ("Drug Policy"). *Id.* at 609. The Drug Policy provided that Mountaineer would conduct testing of employees to help detect abuse. *Id.* It required random urine specimen drug testing for "[a]ny employee in a safety-sensitive position" and cautioned that a positive drug test would result in discharge. *Id.*

In *Mountaineer*, the arbitrator found that (1) Watson held a safety-sensitive position; (2) that the bargaining agreement gave Mountaineer the right to implement mandatory random drug testing; (3) that the findings made by a previous arbitration sustaining the validity of the Drug Policy were *res judicata*; (4) that the chain of custody for Watson's specimen was sufficient; and (5) the procedure used to test Watson was not defective. *Id.* The arbitrator nonetheless continued:

> ments, including the determination of company policy, which does not interfere with the conditions of the Agreement as affecting wages, hours of work, and working conditions. All rights of Management, except insofar as the same are expressly modified in the terms of this Agreement, are hereby reserved to the Company, and the Company specifically has the power and the right to manage the business and direct the working forces, including but not limited to, the right to hire, suspend or discharge for proper cause.
>
> *Id.*

> The Arbitrator does, however, agree with the Union that [Watson's] unblemished work history over 15 years of employment with [Mountaineer], the Arbitrator finds that there was not just cause for his termination. The Arbitrator rejects the Policy as applied here and finds that just cause for immediate termination did not exist under these circumstances. . . . [Although Mountaineer's Drug Policy previously has been upheld on its face,] that does not mean that there are not individual exceptions to the strict application of the Policy. Laws and policies upheld on their face can always be challenged in their application. The Arbitrator agrees with the Union that leniency should have been afforded [Watson] since he tested negative in February and September and showed no signs whatsoever of poor or adverse job performance.

Id. at 909-10 (emphasis omitted).

On appeal, the union argued that the arbitrator was not required to uphold discharges mandated by the Drug Policy because the language of the bargaining agreement permitted Mountaineer to discharge only for "proper cause." *Id.* at 610. Thus, the union argued the arbitrator only had to determine whether Watson's discharge was for "proper cause" rather than assume that a violation of the Drug Policy constituted "proper cause." *Id.* The Fourth Circuit disagreed stating:

> [W]e find that the Drug Policy was to be interpreted and enforced in accordance with the CBA. A valid and proper policy promulgated by a employer pursuant to a collective bargaining agreement is enforceable. . . .
>
> The CBA gave Mountaineer the requisite authority to enforce the Drug Policy and to discharge Watson for violating [it]. The arbitrator's role clearly prohibited him from amending, adding to, or subtracting

> from the CBA. Therefore, by converting Watson's permanent discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, the arbitrator blatantly ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that appealed to his own notions of right and wrong. . . . [T]he words "proper cause" of the CBA cannot be the loophole through which the arbitrator bypasses the Drug Policy's mandatory language to implement his own brand of industrial justice. In reinstating Watson, the arbitrator illegally created an exception to the strict application of the Drug Policy's mandatory termination. By fashioning an entire new remedy and infusing his personal feelings and sense of fairness into the award, the arbitrator created an award that failed to draw its essence from the CBA, which clearly reserved to Mountaineer the right to promulgate and enforce such drug policies.

Id. at 610.

Mountaineer controls the case at hand. As in *Mountaineer,* the CBA at issue here contains a management rights clause. That clause states:

> It is the right of the company to manage its business and direct the work force. The right to manage means that all rights not expressly limited by a specific provision of this agreement remain the company's. When the company exercises its authority, it is not a violation of this agreement. The exercise of that authority shall not conflict with the provisions of this agreement.

(Compl. ex. 1, art. 3.) Additionally, article 18 of the CBA, entitled Discharge and Suspension, provides: "*The company has the authority to discipline,* to issue oral warnings, to issue written warnings, to suspend, and/or *discharge associates for just cause.* The company will develop and post written work rules and disciplinary

procedures, and tardy and absence rules." (*Id.* art. 18 (emphasis added).) Pursuant to these provisions, Bandag adopted Work Rules which provide, in relevant part:

> The following list of work rules and safety regulations is published for the benefit and information of all employees. . . . Failure to conform to these rules and regulations or to ordinary common sense standards of conduct necessary for the mutual benefit of the employees and the company, shall be considered cause for disciplinary action.
>
> A. *Incidents such as the following shall be considered violations constituting just cause for discharge*:
>
> . . . .
>
> * Insubordination, refusal to follow instructions or perform assigned work. . . .

(*Id.* ex. 2, p. 1 (emphasis added).) Similarly, Bandag adopted a SAP. The policy provides, in relevant part:

> In order to insure the safety of the work place and the work force, the following work rules will apply to all ascociates and are effective immediately upon notice to associates.
>
> . . . .
>
> When there is just cause, each associate, as a condition of continued employment will . . . be required upon request of Company supervisory personnel, to submit to blood and/or urine tests for determining use of alcohol and/or drugs.
>
> . . . .
>
> *If an associate refuses to provide a urine or blood specimen for laboratory testing when requested by the company, the associate shall be discharged.*
>
> . . . .
>
> The company may require an associate to supply a blood or urine sample for testing during an annual

> medical examination or during any examination where the associate's entitlement to workers' compensation benefits is concerned, or disability benefits or return from a leave of absence.

(*Id.* ex. 3, pp. 4-7 (emphasis added).)

Finally, regarding arbitration, the CBA provides that if a dispute is taken to arbitration, "[t]he arbitrator selected must interpret and apply this agreement only." (Compl. ex. 1, art. 17.)

The court also notes that because Bandag does business with the federal government, Bandag is subject to the 1988 Drug-Free Work Place Act. (Oleksiak Aff.)

In this case, the arbitrator found that Royster's conduct constituted insubordination. (Compl. ex. 5, p. 14 ("Under the circumstances which then existed, the Grievant's inaction evidenced a refusal to obey Willsie and constituted insubordination.").) He continued, however, to find:

> [T]wo factors cause discharge of the Grievant to lack just cause. The Grievant complied with Willsie's order while the Company was continuing its efforts to convince him to do so, that is, before it appeared the Company had decided it was too late for the Grievant to comply and while it was reasonable for him to believe he could comply. . . . Secondly, the evidence presented including but not limited to the testimony of Bobby Talley, Administrative Manager, evidences that the Grievant's participation in legitimate Union activities was among the factors considered by the Company in deciding to discharge him. Just cause prohibits disciplining an employee for participating in legitimate union activities. Taken together the two factors cause the Grievant's discharge to lack just cause.

(*Id.* at p. 14.)

In this case, there is no indication that Bandag's Work Rules and SAP were not valid and proper policies. Thus,

Bandag had the authority to enforce its Work Rules and SAP and to discharge Royster for insubordination. Since the arbitrator's role was limited to interpreting the CBA, the arbitrator did not do his job when he converted Royster's discharge to a thirty-day suspension. The words "just cause" "cannot be the loophole through which the arbitrator bypasses the [company's policies] to implement his own brand of industrial justice." *Mountaineer,* 76 F.3d at 610. In reinstating Royster, the arbitrator created an exception to Bandag's policy of discharge for insubordination. The award thus fails to draw its essence from the CBA and cannot be enforced.

Defendants argue that *Mountaineer* is limited to cases where the arbitrator agrees that an employer-promulgated rule is part of a valid and proper policy. No such limitation, however, is expressed in *Mountaineer* and the court finds no basis to infer one. Moreover, in this case, there has been no argument that Bandag's SAP or Work Rules were invalid. The court finds defendants' other attempts to distinguish *Mountaineer* to be equally unavailing.

C. *Claim Against Royster*

Without citing any case law on point, defendants argue that plaintiff's complaint fails to state a claim against Royster because Royster is represented by the union and because he is not a party to the CBA. The court is unpersuaded by this argument. The court notes in passing that in *Mountaineer,* Watson, the employee who was discharged, was a named defendant along with the unions.

IV. *Conclusion*

For the reasons discussed above, defendants' motion for summary judgment is DENIED. Plaintiff's motion for summary judgment is GRANTED. It is, therefore, ORDERED, ADJUDGED, and DECREED that the award of the arbitrator, insofar as it requires plaintiff to reinstate

defendant Royster and provide him with other relief, is VACATED.

This 19 December 1996.

/s/ W. Earl Britt
W. EARL BRITT
United States District Judge

APPENDIX C

AAA Case No.: 31 300 00027 95
Grievance No.: 5-002-95
Grievance : Discharge
Grievant: Charles A. Royster, Sr.
Arbitrator's File No.: 1995.1963

IN THE MATTER OF THE ARBITRATION BETWEEN
BANDAG, INCORPORATED,
OXFORD, NORTH CAROLINA

and

LOCAL UNION #922
UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC

OPINION AND AWARD

ARBITRATOR: JACK CLARKE

AWARD DATE: MAY 2, 1996

* * * *

PROCEDURAL HISTORY

Bandag, Incorporated, Oxford, North Carolina is hereinafter referred to as "Company". Local Union #922, United Steelworkers of America, AFL-CIO, CLC is hereinafter referred to as "Union". Charles A. Royster, Sr. is hereinafter referred to as "Grievant".

The Grievant was suspended pending investigation on May 25, 1995 and discharged shortly thereafter. Grievance no. 5-002-95 which objects to the discharge was submitted to the Company in writing on or about May 26, 1995 and thereafter processed in accordance with Article

17 "Dispute Resolution" of the Agreement between the Company and Local #922, an affiliate of the United Rubber, Cork, Linoleum and Plastic Workers of America [1] effective February 5, 1995 (hereinafter "1995 Agreement"). Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 17. Using the services of the Charlotte, North Carolina Regional Office of the American Arbitration Association (AAA), Jack Clarke was selected as Arbitrator.

On November 10, 1995 the Union filed a charge against the Company with Region 11 of the National Labor Relations Board the substance of which was in part related to the subject of Grievance no. 5-002-95. The NLRB, by letter from its Regional Director dated December 11, 1995, advised of his decision to defer action on the charge pending resolution of the grievance.

An arbitration hearing was held in a conference room within the Company's offices in Oxford, North Carolina on February 16, 1996. During the course of the hearing both parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument.

The parties elected to file post-hearing briefs. The Arbitrator received the briefs from the AAA on March 25, 1996.

The parties stipulated the grievance and arbitration were timely and properly before the Arbitrator.

The parties stipulated the issues to be resolved in this arbitration to be whether the discharge of the Grievant was for just cause and, if not, what should the remedy be.

---

[1] The "Union" as identified in the first paragraph of the Procedural History is the successor to Local #922, an affiliate of the United Rubber, Cork, Linoleum and Plastic Workers of America.

PERTINENT PROVISIONS OF THE AGREEMENT BETWEEN THE PARTIES FIRST EFFECTIVE FEBRUARY 5, 1995

* * * *

ARTICLE 18

DISCHARGE AND SUSPENSION

The company has the authority to discipline, to issue oral warnings, to suspend, and/or to discharge associates for just cause.

The company will develop and post written work rules and disciplinary procedures, and tardy and absence rules.

BACKGROUND

To facilitate understanding the parties' positions, the Arbitrator has outlined the evidence presented. Other facts and evidence will be referred to in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The Company produces retread tires in its Oxford, North Carolina plant. Certain of the Company's employees at that facility including the Grievant were represented by the Union and covered by the 1995 Agreement at times pertinent to this grievance.

The Grievant had worked for the Company for approximately 8 years when he was discharged in May 1995. The Grievant also served as Union Shop Steward and Executive Board Member. He took an active part in the negotiations during which the parties agreed to the terms of the 1995 Agreement and was one of the three persons who signed that agreement on behalf of the Local Union.

The Company adopted and promulgated "Bandag Incorporated Work Rules and Safety Regulations" sometime before May 1995. The work rules provide in part:

> The following list of work rules and safety regulations is published for the benefit and information of all employees. . . . Failure to conform to these rules and regulations or to ordinary common sense standards of conduct necessary for the mutual benefit of the employees and the company, shall be considered cause for disciplinary action.
>
> A. Incidents such as the following shall be considered violations constituting just cause for discharge:
>
> . . . .
>
> • Being at work under the influence of alcohol or drugs
>
> . . . .
>
> • Insubordination, refusal to follow instructions or perform assigned work
>
> . . . .
>
> B. Incidents such as the following are considered volations of less serious nature than those listed in Section A. Violations of the type listed in this Section B shall be considered as grounds for a warning letter or disciplinary suspension. Repeated violations will result in discharge.
>
> . . . .

The Company adopted and promulgated "Bandag Corporation Policy Guidelines and Work Rules—Substance Abuse October 1, 1990" (hereinafter "Substance Abuse Policy") before May 1995. The policy provides in pertinent part:

> *Safety of Work Force; Work Rules; Blood and Urine Tests*
>
> In order to ensure the safety of the work place and the work force, the following work rules

will apply to all associates and are effective immediately upon notice to associates.

. . . .

When there is just cause, each associate, as a condition of continued employment, will . . . be required upon request of Company supervisory personnel, to submit to blood and/or urine tests for determining use of alcohol and/or drugs.

. . . .

Work Rules

Restricted Period. A restricted period means:

(1) Any time the associate is entitled to compensation from the company pursuant to a provision of this agreement other than non-work hours for which the associate is entitled to compensation.

(2) Any time the associate is present on company property or a place to which the company has access as a business invitee . . ., or

(3) Any time an associate is operating a vehicle or equipment owned or leased by the company.

. . .

. . . .

Positive Test Result— . . .

. . . .

If an associate refuses to provide a urine or blood specimen for laboratory testing when requested by the company, the associate will be discharged.

. . . .

The company may require an associate to supply a blood or urine sample for testing if the company has just cause or a reasonable suspicion that (1) an associate has alcohol or a drug present in his body

> during restricted period. . . . For the purposes of the preceding sentence, just cause or reasonable suspicion, means that the company's opinion is based upon objective facts, including but not limited to, observation or reports of circumstances consistent with the possession, sale or distribution of alcohol or drug, or observation by the company that the associate is exhibiting irregular behavior, slurred speech, uncoordinated movement, gait, stupor, excessive giddiness, unexplained periods of exhilaration and excitement, impaired judgment, accidents which are not fully explainable, detection by the company of the odor of alcohol on an associate's breath, reports of substance abuse from reliable sources.
>
> . . . .
>
> The company shall only use testing laboratories or other facilities that conform to standard testing procedures.

On May 25, 1995 the Grievant reported a problem with his eye to his immediate supervisor. The Grievant testified water had fallen into his eye from a conveyor belt. Regardless of the source of the irritant, the Grievant's problem was reported to Kevin Willsie, Production Superintendent. Willsie drove the Grievant to a doctor's office where his eye was treated. Willsie then drove the Grievant to a hospital for the purpose of obtaining a urine sample for a drug test. Willsie testified it was standard practice to have a drug test done when an employee was involved in an on-the-job accident, that is, suffered a workers' compensation injury. During the arbitration hearing the Grievant acknowledged the Company's practice and that enroute to the hospital he had told Willsie he did not object to a drug test.

According to Willsie, he and the Grievant arrived at the hospital about 12:30 p.m. A nurse asked the Grievant to provide a urine specimen. The Grievant replied he could

not then provide one. In response to another question, the Grievant told the nurse he did not want any water. The testimonies of Willsie and the Grievant and of Anthony "Tony" Mitchell, Production Supervisor, differ regarding exactly what was said by each of them from then until approximately 4:00 p.m. It is undisputed, however, that about 20 minutes after the Grievant and Willsie arrived at the hospital, the Grievant told Willsie the Grievant would provide a blood or hair sample for drug testing and after talking to the nurse, Willsie told the Grievant that only urine samples were authorized; that the Grievant continued to say he could not provide a urine sample and declined to drink anything except one or two sips of water; that Mitchell arrived about 2:00 p.m.; that Willsie spoke by telephone to other supervisors one of whom spoke to the Grievant; that at some point Willsie mentioned the Grievant's continuing to refuse to give a simple might be considered insubordination and place the Grievant's job at risk and the Grievant responded that Willsie was trying to threaten the Grievant; that at about 3:30 p.m. Mitchell drove the Grievant to a nearby store where the Grievant bought and ate crackers; that while returning to the hospital the Grievant told Mitchell- he might be able to provide a sample; and that the Grievant did so shortly after he and Mitchell arrived back at the hospital. The sample was reported to be negative for all drugs tested.

Later on May 25 Company supervisors decided to suspend the Grievant pending investigation. On May 26, 1996 the Grievant was discharged for insubordination. On cross-examination a number of Company witnesses each testified that he had no recollection that the Grievant's past record was mentioned during the discussions that resulted in his being suspended and discharged.

POSITIONS OF THE PARTIES COMPANY

The Company contends discharge of the Grievant was for just cause.

The Company contends the Grievant's actions constituted a refusal to provide a urine sample, which is punishable by discharge.[2]

The Company contends that despite admitting that he knew the penalty for refusing to provide a sample was discharge and that he had been told his actions could be insubordinate and management was considering discharge, the Grievant persisted in refusing to try to generate a urine sample. The Company contends the Grievant "should not be permitted to render the company policy meaningless by semantic manipulation." [3]

The Company contends the Grievant's actions suggested only a desire to confront Willsie in that the Grievant "has never offered a valid explanation for his behavior" and his behavior did not suggest an inability to urinate but rather "that he believed the rule would never be applied to him." [4]

The Company contends the Grievant knew Willsie could not fire him and that management was reasonable and careful. The Company contends its decision "should not be overturned because Management failed to act in haste." [5]

---

[2] Leland Oil Mill, 91 LA 905 (1988) (Nicholas, Arb.); Union Plaza Hotel, 88 LA 528 (1986) (McKay, Arb.); Grain Processing Corp., 92 LA 265 (1989) (Hilpert, Arb.); Jim Walter Resources, 88 LA 1254 (1987) (Nicholas, Arb.).

[3] Cyclops Corp., 78 LA 1067 (1982) (Marlatt, Arb.); Jim Walter Resources, *supra* endnote 2.

[4] Anheuser-Busch, Inc., 63 LA 474 (1974) (Shearer, Arb.); Bowater Carolina Co., 92 LA 162 (1989) (Clarke, Arb.).

[5] Frank Elkouri & Edna A. Elkouri, *How Arbitration Works* 665 (4th ed. 1985), *quoting* Stockham Pipe Fittings Co. (1 LA 160, 162 (1945) (McCoy, Arb.); Bowater Carolina Co., *supra* endnote 4.

The Company contends the Union "should not be able to use an after-thought defense to diminish the principle of 'Work, then grieve'." [6]

The Company requests the Arbitrator deny Grievance no. 5-002-95.

UNION

The Union contends discharge of the Grievant was not for just cause.

The Union contends the Grievant did not refuse to submit to a drug test but rather specifically offered to provide a blood or hair sample for analysis. The Union contends the Grievant's is "not the image of a person who is fearful of a drug test result nor of a person who is delaying a test without cause."

The Union contends that if the Grievant did tell Willsie "you cannot make me produce urine", the statement does not prove insubordination but rather correctly restates a physical truth.

The Union contends the evidence shows the existence of "some type of friction between the Grievant and Willsie".

The Union contends the Grievant's testimony that he believed he could not eat in the laboratory and that Willsie would not let him leave the laboratory until after Mitchell arrived was unrebutted.

The Union contends the Grievant offered a truthful and reasonable explanation for why he refused to drink, that is, he had not eaten and was feeling "queasy".

The Union contends "that any insubordination clearly arose after the fact" in that the Grievant did provide a urine sample and that it was not until later that he was suspended for insubordination.

---

[6] Jim Walter Resources, *supra* endnote 2.

The Union contends the evidence suggests the Company believes the Grievant is responsible for events beyond his control, specifically including the absence of supervisors from the plant on May 25 as a result of their attending a seminar.

The Union contends the processes whereby the Company decided to suspend and discharge the Grievant are suspect; that the non-appearance of the person who actually decided to discharge the Grievant deprived him of industrial due process; and that the testimony of Bobby Talley, Administrative Manager, shows the Company considered the Grievant's behavior as a Union steward—but not his past clean record—in deciding to discharge him.

The Union contends the Grievant testified truthfully about how he felt on May 25, 1995.

The Union contends that if the Grievant's delay in providing a urine sample on May 25, 1995 warranted discipline, the punishment given to him " 'after the fact' " was too severe and that at most he should have been given a 3-day suspension or a written warning; that there are degrees of insubordination; and that the Grievant's, if he was insubordinate, did not constitute a direct refusal to obey an order.

The Union requests the Arbitrator grant Grievance no. 5-002-95 and direct the Company to reinstate the Grievant to his former job with full seniority and make him whole for all pay and benefits lost as a result of his unjust suspension and discharge.

DISCUSSION

The stipulated issues to be resolved in this arbitration are whether the discharge of the Grievant was for just cause and, if not, what should the remedy be. The Arbitrator finds some discipline of the Grievant was for just

cause but that discharge of the Grievant was not for just cause. The Arbitrator therefore denies Grievance no. 5-002-95 in part and grants it in part and directs the remedy set out below. The Arbitrator's reasoning follows.

It is well established in labor arbitration that where, as in the present case, an employer's right to discharge an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the discharge of an employee was for just cause. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged. Having alleged that the Grievant was insubordinate, the Company had the burden of persuading the Arbitrator that the Grievant had in fact been insubordinate on May 25, 1995. The Company satisfied that burden.

That the Grievant neither provided a urine sample nor attempted to urinate nor stated that he would try for approximately 3 hours on May 25 is, of course, undisputed. That by itself does not prove insubordination, however. Reduced to its essence, insubordination consists of an employee's declining to respect managerial authority. Thus in some cases it may be necessary to inquire into why an employee did or did not do something in order to determine whether his or her conduct was insubordinate. In the present case, for example, if the Arbitrator were persuaded that on May 25 the Grievant had been physically incapable of providing a urine sample, the Arbitrator would be reluctant to find the Grievant's not having done so constituted insubordination.

But the Arbitrator is not persuaded that the Grievant *could not* provide a urine sample on May 25. On the contrary, the evidence convinces the Arbitrator that the Grievant did not urinate for about 3 hours after the Grievant and Willsie arrived at the hospital for some rea-

son other than physical inability. The Grievant did not even *try* to urinate during that period, of course. Contrary to the argument in the Union's post-hearing brief, while it is generally accepted that when "one has to go, he has to go", the converse, that is, that one knows when he or she cannot, is not accepted. Moreover, the Grievant refused to drink water and thereby improve the likelihood of his being able to provide a urine sample. Certainly the Grievant's drinking one or two sips did not evidence an effort to comply with the Company's demand that he provide a sample for a drug test.

The Grievant's testimony that he didn't drink because his stomach was queasy as a result of his not having eaten is not credible. The Grievant's own testimony shows that he probably had eaten shortly before he and Willsie left the plant. The Grievant's testimony that on the day of the arbitration hearing he remembered seeing vending machines in the hospital lobby but wasn't aware of them on May 25 borders on being inherently incredible. In addition, if the Arbitrator were persuaded that the Grievant was a quiet, retiring individual who was unwilling to speak for himself, the Arbitrator might be able to accept the Grievant's story that he remained in the laboratory because he believed Willsie woudn't let him go elsewhere. But the Grievant's demeanor at the arbitration hearing and his reputation as a Union officer make clear that the Grievant is willing and capable of speaking up for himself. Finally, the Arbitrator expects that an individual who didn't want to drink because he or she felt doing so would likely cause illness would say something to that effect, but the Grievant didn't raise the "queasy stomach" story until well after he had provided a sample.

The evidence supports the Union's argument that there was some kind of friction between Willsie and the Grievant on and before May 25. But the evidence shows no such friction between Mitchell and the Grievant, and to the extent the Grievant's and Willsie's testimonies differed

regarding what happened after Mitchell arrived at the hospital, Mitchell's testimony tended to corroborate Willsie's and not Grievant's.

The evidence does not clearly disclose why the Grievant wished to not provide a urine sample on May 25. The Union correctly argues that the negative test results and the Grievant's apparently seriously expressed willingness to provide a blood or hair sample evidence that the Grievant was not motivated by a fear that a urine test would show he had ingested an illegal drug. But why the Grievant wanted to not provide a urine sample on May 25 is irrelevant to resolution of the present grievance. The evidence persuades the Arbitrator that the Grievant wanted to avoid giving a urine sample and refused to try to urinate. That conduct, so motivated, establishes insubordination. In short, the evidence persuades the Arbitrator that the Grievant refused to try to provide a urine sample on May 25, 1995 for some reason other than a belief that he was unable to do so.

It should be noted that the Grievant's resort to self-help effectively deprived the Arbitrator of the opportunity to determine whether the Company's direction to provide a urine sample was a proper exercise of its managerial prerogatives. In other words, it was the Grievant's resort to self-help which caused the issue in this arbitration to relate to insubordination instead of being whether the Company had the right to direct the Grievant to provide a urine sample under the circumstances which existed on May 25.

In summary, the Grievant refused to even try to comply with Willsie's direction to provide a urine sample for a drug test for over 2 hours on May 25. Under the circumstances which then existed, the Grievant's inaction evidenced a refusal to obey Willsie and constituted insubordination. Absent a danger to an empoyee's health or safety, he or she does not have the right to wait 2 hours or longer before even trying to comply with a supervisor's order to provide a urine sample for a drug test. The Arbitrator

concludes some discipline of the Grievant was for just cause. The Arbitrator must therefore deny Grievance no. 5-002-95 at least in part.

Despite the above, two factors cause discharge of the Grievant to lack just cause. The Grievant complied with Willsie's order while the Company was continuing its efforts to convince him to do so, that is, before it appeared the Company had decided it was too late for the Grievant to comply and while it was reasonable for him to believe he could comply. The argument in the Company's post-hearing brief that to give weight to the Grievant's late compliance is akin to holding that an employee who arrives at work late is not tardy is not persuasive. A more accurate analogy would be to say that an employee who arrives at work within the period of time the Company deems tardy is not absent. Secondly, the evidence presented including but not limited to the testimony of Bobby Talley, Administrative Manager, evidences that the Grievant's participation in legitimate Union activities was among the factors considered by the Company in deciding to discharge him. Just cause prohibits disciplining an employee for participating in legitimate Union activities. Taken together the two factors cause the Grievant's discharge to lack just cause. The Arbitrator must therefore grant Grievance no. in part.

Having found that some discipline of the Grievant was for just cause but that his discharge was not, the Arbitrator must frame an appropriate remedy. Because the Grievant's misconduct was serious, the Arbitrator will direct that his discharge be reduced to a suspension of 30 calendar days duration.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, Grievance no. 5-002-95 is granted in part and denied in part. The Company is directed to

(1) reduce the Grievant's discharge to a 30-calendar day suspension, (2) reinstate the Grievant to his former job with full seniority and (3) make him whole for all time and benefits lost as a result of his discharge without just cause except for the first 30 calendar days of that period.

From any backpay due the Grievant the Company may subtract an amount equal to the total of (1) sums paid the Grievant for unemployment compensation as a result of having been unemployed from 30 calendar days after May 25, 1995 to the date of his reinstatement in accordance with this Award and (2) sums earned by the Grievant during that same period as a result of substitute employment. If the Company elects to reduce backpay due the Grievant as a result of his having been paid unemployment compensation, the Company shall pay to whatever governmental agency paid unemployment compensation to the Grievant an amount equal to the amount by which the Company reduces backpay due the Grievant for unemployment compensation paid him.

The Arbitrator will retain jurisdiction of the present grievance until July 8, 1996 to resolve disputes regarding the remedy directed herein, if any. If the Charlotte, North Carolina office of the American Arbitration Association is advised by telephone or other means of any dispute regarding the remedy directed on or before 4:30 p.m. Eastern Time on July 8, 1996, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the Charlotte, North Carolina office of the American Arbitration Association is not advised of the existence of a dispute regarding the remedy directed herein by that time and date, the Arbitrator's jurisdiction over this grievance shall then cease.

DATED: May 2, 1996

/s/ Jack Clarke
JACK CLARKE
Arbitrator
Montgomery, Alabama

APPENDIX D

Filed: September 2, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1106
CA-96-430-BR

BANDAG, INCORPORATED
Plaintiff-Appellee

v.

LOCAL 922, UNITED STEELWORKERS OF AMERICA; UNITED STEELWORKERS OF AMERICA, AFL-CIO LOCAL 6660, AFL-CIO-CLC; CHARLES A. ROYSTER,
Defendants-Appellants

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX E

[Filed Dec. 27, 1996]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-4125

THE HOOVER COMPANY,
Plaintiff-Appellee,

v.

LOCAL 1985, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio

BEFORE: GUY, SUHRHEINRICH, and COLE, Circuit Judges.

PER CURIAM. Defendant-Appellant Local 1985 (the "Union") appeals the decision of the district court vacating an arbitrator's decision on the ground that the arbitrator exceeded the scope of his authority. We REVERSE.

This appeal arises out of a grievance filed by the Union on behalf of union member Angela Alazaus against Plaintiff-Appellee The Hoover Company ("Hoover") under a collective bargaining agreement ("CBA") in effect between the parties. In February of 1992, Alazaus failed to report to work for four consecutive days due to an

alleged back injury. When Alazaus eventually reported to work on the fifth working day following her alleged injury, Hoover immediately discharged her for violation of Work Rule 18, which mandates termination after four consecutive days of unexcused absence.[1] Hoover subsequently denied Alazaus's grievance contesting her termination, and the parties submitted the dispute to arbitration, with the Union intervening on behalf of Alazaus.

Hoover argued before the arbitrator that Alazaus was properly terminated under Rule 18. The Union disagreed. The arbitrator's opinion ordered Alazaus reinstated without back pay as a Hoover employee. Hoover quickly filed suit in the district court to vacate this award. The Union responded by filing its own petition for confirmation of the award. The district court ruled in favor of Hoover. It vacated the decision of the arbitrator for exceeding the scope of his authority in modifying the penalty imposed by Hoover. From that decision the Union now appeals.

The issue before this Court is whether the arbitrator properly exercised his authority under the CBA by reinstating Alazaus, whether or not the arbitrator found that Alazaus violated Rule 18. The CBA contains a general provision permitting discharge only upon a showing of "proper cause". Hoover asserts this clause does not apply to the case at bar because the arbitrator's authority under the CBA was limited to application of Rule 18's more specific penalty of discharge. The Union counters that the CBA's proper cause provision entitles the arbitrator to review Hoover's termination decision for proper cause, despite the specific work rule penalty.

This Court reviews arbitrators' decisions under an extremely narrow standard because the parties explicitly contracted for the arbitrator, not the federal courts, to resolve

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[1] Rule 18 was promulgated pursuant to a management rights clause in the CBA vesting Hoover with the authority to establish rules and regulations and maintain the efficiency of the work force.

their dispute. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987); *Eberhard Foods, Inc. v. Handy*, 868 F.2d 890, 891 (6th Cir. 1989). If the arbitrator's decision "draws its essence from the collective bargaining agreement," then that decision cannot be disturbed on appeal. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Furthermore, "mere ambiguity in the opinion accompanying an award" does not entitle a district court to vacate the award. *Id.* at 598. Only when that ambiguity leads to a conclusion that the arbitrator exceeded the scope of his authority can the award be vacated. *See Bruce Hardwood Floors v. Southern Council of Indus. Workers*, 8 F.3d 1104, 1107 (6th Cir. 1993) (arbitration award must stand if arbitrator is even arguably construing the CBA at issue).

In order to determine whether the arbitrator's opinion draws its essence from the CBA, we must determine the scope of the arbitrator's authority. *Eberhard*, 868 F.2d at 892. The breadth of this scope depends upon the arbitrator's interpretation of the language in the CBA. *Id.* ("[I]t is the language of the CBA and the arbitrator's own construction thereof, which determines the scope of the arbitrator's authority."). Unfortunately, the arbitrator's opinion is not a paradigm of clarity. The arbitrator failed to state explicitly whether or not he found a Rule 18 violation. Hoover's entire argument presupposes that the arbitrator found a Rule 18 violation.[2]

As the parties' arguments reflect, the penalty for violation of Rule 18 and the proper cause provision are susceptible to differing interpretations as to whether the arbitrator may review sanctions imposed by Hoover for work rule violations. The arbitrator possesses exclusive author-

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[2] Hoover does not claim that the CBA prevents an arbitrator from reviewing for proper cause a decision to terminate when that decision is made *absent* a specific work rule violation. Hoover claims only that an arbitrator's determination of a Rule 18 violation prevents review of the Rule's explicit termination penalty.

ity to resolve this contractual ambiguity. *See Misco*, 484 U.S. at 37-38. We must defer to the arbitrator's resolution of this ambiguity as long as it does not disregard or modify plain and unambiguous contractual language. *See Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987) (citations omitted). *See also Misco*, 484 U.S. at 37-38.

By ordering reinstatement, the arbitrator implicitly concluded that the proper cause provision of the CBA applied to Hoover's decision to discharge Alazaus. The ambiguous language of the CBA does not explicitly rule out such an interpretation of the contract. In the absence of an explicit statement limiting the arbitrator's authority, we must defer to this interpretation. *See Eberhard*, 868 F.2d at 893. The language of the CBA is not "sufficiently clear so as to deny the arbitrator the authority to interpret the agreement as he did." *Id.* at 893. Therefore, even assuming that the arbitrator found a Rule 18 violation, application of the proper cause provision to Hoover's termination decision does not violate the CBA. *See id.* The arbitrator's award simply did not exceed the scope of his authority. Consequently, the opinion drew its essence from the CBA and must be confirmed. *See id.*

For the foregoing reasons, we REVERSE the decision of the district court.

(2)

Supreme Court, U.S.
FILED
FEB 2 1998
CLERK

No. 97-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL 922, UNITED STEELWORKERS OF AMERICA; and CHARLES A. ROYSTER,

Petitioner,

v.

BANDAG, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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20 pp

QUESTION PRESENTED

When management has the contractual mandate to develop and enforce work rules, may an arbitrator find that an employee violated the work rule against insubordination but then dispense his own brand of industrial justice by ignoring the predetermined penalty of discharge and instead creating a remedy not found in the collective bargaining agreement's work rules?

PARTIES TO THE PROCEEDING

Petitioner United Steelworkers of America, AFL-CIO-CLC; Local 922, United Steelworkers of America; and Charles A. Royster were Defendants-Appellants below. Bandag, Incorporated was Plaintiff-Appellee below.

Pursuant to this Court's Rule 29.6, Respondent Bandag, Incorporated notes that it is a publicly-held corporation; it has no parent company and, except as listed below, all subsidiaries are wholly owned:

Indag Rubber Limited

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STATEMENT OF THE CASE

The collective bargaining agreement ("CBA") negotiated between Bandag, Incorporated ("Company") and the United Steelworkers of America ("Union") directed the Company both to develop and post work rules and to discipline, suspend, and discharge its employees. App. 17a.

Pursuant to its contractual obligation, after negotiations and conferences, the Company posted a rule prohibiting insubordination. The rule expressly provides that its violation would constitute just cause for discharge. App. 18a. The Company's practice was to implement the stated sanction upon discovery of a violation. The Company discharged insubordinate employees without challenge by the Union.

The Substance Abuse Policy is the other relevant rule developed and posted by the Company. During the 1990 contract negotiations, the parties bargained over the terms of a drug and alcohol testing program. Res. App. 1a. The Substance Abuse Policy, implemented in 1990, authorizes the Company to require an employee for just cause to supply a urine sample for a drug test. App. 11a. Under the policy, just cause exists whenever an employee suffers a potentially compensable workplace injury. App. 11a-12a. The policy expressly provides that if an employee refuses to supply a specimen when requested, he will be discharged. App. 11a.

Employee Royster, upon request, refused to provide a urine sample in violation of the Company's work rule and drug policy. The Company followed the predetermined sanction and discharged him.

The Union filed a grievance, which was not resolved through the lower levels of the grievance procedure and proceeded to arbitration. Following an evidentiary hearing, the arbitrator agreed that Royster was insubordinate. App. 25a, 27a. Although the CBA's work rules provided no penalty for insubordination other than discharge and limited the arbitrator's function to interpreting and applying the CBA only, the arbitrator ordered the Company to reduce the discharge penalty to a thirty-day suspension, and to pay Royster for all time and benefits lost as a result of the discharge except for the first thirty calendar days of that period. App. 12a, 28-29a. The arbitrator afforded Royster leniency because he eventually provided the sample several hours later at the end of his shift, and because the arbitrator surmised that the Company considered Royster's union activities in its decision to discharge him.[1] App. 28a.

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[1]The arbitrator leapt to this conclusion without any supporting findings of fact. He specifically found only that a number of Company witnesses had testified of no recollection that Royster's past record was mentioned during discussions that resulted in his suspension and discharge. There was no finding that cited with any particularity the content of the testimony of any witness or evidence concerning Royster's union activity as a factor considered by the Company in deciding to discharge him.

Similarly, the recorded testimony yields no support for the conclusion that anti-union animus motivated the discharge. In response to the arbitrator's question, Administrative Manager Talley stated that Royster's past expressions of concern about safety and related issues were *discussed*, not considered, during the meeting in which the decision to discharge was made. When asked point blank on cross-examination by Union counsel whether the Company took any action against Royster for voicing these concerns, Talley replied, "Certainly not."

Not a scintilla of evidence exists to demonstrate any retaliation for Royster's union activities which had been open and obvious for years

(continued...)

Bandag filed a complaint in federal district court seeking to vacate the arbitration award. The parties filed cross-motions for summary judgment. The district court granted the Company's motion and vacated the arbitration award. The circuit court affirmed in an unpublished, *per curiam* opinion.

REASONS FOR DENYING THE WRIT

The Court's supervisory jurisdiction is neither necessary nor warranted in this case. The order of the fourth circuit is consistent with this Court's opinions. Moreover, there is no conflict of authority among the circuit courts on the issue presented. Before reaching these issues, however, the Company must first dispel the false impressions created in the Union's petition.

A. The Union misrepresents the genesis of the Company's work rule and policies. Misleading characterizations include: "Company promulgated" (Pet'r Br. 3), "company-promulgated policy" (Pet'r Br. 5), "company-promulgated work rules" (Pet'r Br. 6, 7, 9), "non-negotiated company work rules" (Pet'r Br. 6), "non-negotiated work rules" (Pet'r Br. 8, 12), and so on, in an attempt to convey the impression that the Union had no say whatsoever in the rule prohibiting insubordination or the Substance Abuse Policy, and no opportunity to discuss these mandatory subjects of bargaining. The fact is that the opposite is true. Res. App. 1a.

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[1](...continued)
prior to his discharge. In fact, the Company presented uncontradicted evidence that it had consistently enforced its work rule against insubordination. An employee's union activity does not insulate him from normal discipline.

The insubordination rule and the drug policy became part of the CBA. The Union was a full participant in the negotiations leading to their adoption. ***The Union never challenged the content of either the rule or the policy***. Furthermore, the Union never sought to negotiate a different insubordination rule or drug policy in 1992, 1994, 1995, or 1996[2] when new CBAs were signed. Asserting that neither the Union nor the arbitrator is bound by the CBA which incorporates the rule and policy because they were "non-negotiated" or "company promulgated" is a misstatement.

The concept advocated by the Union is refuted by the its own authority. "Under an agreement that vested in management the right to establish reasonable rules . . . [,] rules so established must be considered ***a part of the agreement***." *Elkouri & Elkouri: How Arbitration Works*, 765 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (emphasis added; quotation omitted).

> As a practical matter, it is not possible to embody in a collective bargaining contract a complete code of plant rules. Such a code would make the contract too long and cumbersome. It would introduce into collective bargaining new sources of delay and dispute. It would prevent the necessary adjustments and modifications of rules between periods of negotiation.

Id. (quoting *American Zinc Co.*, 20 Lab. Arb. (BNA) 527, 530 (1953) (Merrill, Arb.)).

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[2]Indeed, the parties reached the 1996 agreement ***after*** Royster's discharge.

Putting aside the absence of factual support, the Union's assertion is nothing more than an impermissible collateral attack on the Company's drug policy and work rules. Moreover, the attack comes too late. The Union waived the right to challenge the enforceability of the policy and insubordination rule by failing to raise the issue at any level of the grievance procedure. In vacating the arbitration award, the district court found "there has been no argument that Bandag's SAP [Substance Abuse Policy] or Work Rules were invalid." App. 13a. The Union's same argument before the circuit court met a similar fate. The Union simply cannot raise this issue for the first time during judicial review. In essence, the Union is advancing a hypothetical case to gain review.

B. The circuit court faithfully applied this Court's holding in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), that

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Accord United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)("arbitrator may not ignore the plain language of the contract"). Upon finding that Royster had been insubordinate, the arbitrator was bound by the CBA to find that just cause existed to support Royster's ***discharge***, not that just

cause existed to support ***lesser discipline***. The arbitrator's duties were concluded when the arbitrator found that Royster had been insubordinate and that the predetermined penalty had been applied. He abused his commission when he dispensed his own brand of industrial justice.

By converting Royster's discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, he ignored the unambiguous language of both the substance abuse policy and the work rule against insubordination, and rewrote the CBA by fashioning a modified penalty that appealed to his own notions of right and wrong. The arbitrator invented an individualized exception to the strict application of the substance abuse policy and the work rule prohibiting insubordination. The arbitrator's award deprived Bandag of the benefit of its bargain with the Union.

Federal courts necessarily give great deference to arbitration awards. Deference, however, does not equate with a requirement to enforce all arbitration awards; they are not, as suggested by the Union's argument, immune from scrutiny. Because arbitration provisions in CBAs are voluntary, it would undermine the public policy of encouraging alternative dispute resolution if arbitration awards were not reviewable to ascertain an arbitrator's fidelity to the provisions of a given CBA. In accordance with *Enterprise Wheel*, the circuit court furthered this policy by affirming the district court's vacation of the award because the arbitrator departed from the CBA on a frolic of his own.

C. The Union asserts that the decision below conflicts with the decisions of the second, sixth and eighth circuits. The assertion is meritless and a contrivance to create the impression of a split of authority where there is no such split.

The Union's hunt for divergence among the circuit courts begins with *First National Supermarkets v. Local 338*, 118 F.3d 892 (2nd Cir. 1997). *First National* is inapposite because the second circuit would not apply the *Mountaineer Gas* case due to the particular provisions of the CBA at issue. *Id.* at 897. The *First National* CBA specifically reserved to the arbitrator the power to determine whether a discharge was for just cause. *Id.* at 894. The contract did not limit his authority as did the *Bandag* CBA. *Cf.* App. 12a. Moreover, unlike the present case, there was no separate article in the *First National* CBA which outlined management's duty to make and enforce work rules. *Cf. First National*, 118 F.3d at 894 *with* App. 10-11a.

The Union next relies on the sixth circuit's unreported decision of *Hoover Co. v. Local 1985, IBEW*, No. 95-4125 (6th Cir. Dec. 27, 1996). *Hoover* is easily distinguished. First, the specific language of the no call/no show work rule in *Hoover* is not disclosed. App. 32a. What is known is that the insubordination rule in *Bandag* defines the CBA's just cause language and that the rule plainly provides that insubordination shall constitute "just cause for discharge." App. 11a. Thus, in *Bandag*, the arbitrator did not have to determine if Royster's misconduct constituted just cause; the contractually-mandated rule told him so. Second, the *Hoover* arbitrator failed to state explicitly whether he found that the employee had violated the work rule. App. 33a. The *Bandag* arbitrator, in contrast, repeatedly found that Royster was insubordinate. App. 25a, 27a. Third, the *Hoover* CBA apparently did not limit the arbitrator's authority in the manner prescribed in the present case. *Cf.* App. 34a *with* App. 12a.

Lastly, to support the "split" hypothesis, the Union cites the decision of *Midwest Coca-Cola Bottling Co. v. Allied Sales Drivers, Local 792*, 89 F.3d 514 (8th Cir. 1996). The eighth

circuit distinguished its holding in *Midwest Coca-Cola* from its other decisions involving different contract language. The court noted that the CBA in *Midwest Cola-Cola* was unlike the one in *Bandag* which allowed companies to discharge employees for specific offenses ***as well as*** for just cause. *Id.* at 517-18. The court discussed *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964), in which a company discharged an employee for falsifying a work record. In *Truck Drivers*, the proper cause provision in the CBA was defined with a list of discharge offenses, including dishonesty. Because proper cause was explicitly defined for the arbitrator to include specific offenses, and the employee's conduct fell within one of the listed offenses, the discharge was proper under the terms of the contract. The *Midwest Coca-Cola* court also distinguished *Truck Drivers* in that the contract provided that dishonesty "shall be grounds for discharge." *Midwest Coca-Cola*, 89 F.3d at 518.

The CBA in *Bandag* is similar to the one in *Truck Drivers*. First, the Company retains the express right to discipline and discharge employees for just cause. The insubordination rule and substance abuse policy expressly provide that their violation shall result in a discharge. Therefore, the parties agreed as to what would constitute just cause for discharge. The CBA did not contemplate that an arbitrator could find that an employee committed insubordination and then further consider whether just cause existed to discharge that employee. Such an inquiry would be redundant, and contrary to the intentions of the parties. Contract language is key to the determination of whether an arbitrator exceeded his authority and the courts below properly concluded that the arbitrator did just that.

In sum, the differences between the opinions below and those of the second, sixth and eighth circuits are due to

differences in the underlying CBAs. As conceded by the Union, "there is great diversity among collective bargaining agreements.[3] Pet'r Br. 14. Virtually all CBAs are independently negotiated to fit a specific group of employees. Contracts differ to reflect industry type, geography, size, management organization, sophistication, and a myriad of other factors. Because each CBA is different, each court decision will be different in its application of the unique facts to the specific contract language at issue. The standard of judicial review, however, does not change. The circuit courts -- even those cited by the Union -- consistently have held that an award cannot draw its essence from a CBA where an arbitrator ignores the plain language of the contract and fashions his own remedy which satisfies his personal notions of industrial justice. *Ficks Reed Co. v. Local Union 112, Allied Indus. Workers*, 965 F.2d 123, 126 (6th Cir. 1992); *Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95, 99 (2nd Cir. 1991); *Truck Drivers*, 330 F.2d at 565-66.

D. The Union further contends that circuit disagreement exists over the degree of "deference which must be given to an arbitrator's determination that just cause is lacking, despite contractual language purporting to give an

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[3]Nevertheless, the Union relies on statistics from a study published in 1992 to assert that the varying rate of enforcement by the circuit courts of arbitration awards is attributable to the amount of deference each court gives to awards. Pet'r Br. 14 & n. 3. The inference which the Union attempts to draw from the statistics must be viewed with suspicion. Each particular award is unique, and a federal court's review rests on the particular facts found and language of the CBA. It is unreasonable to extrapolate from the study that the circuit court in *Bandag* paid only "lip service" to this Court's decisions (Pet'r Br. 17). *See McCleskey v. Kemp*, 481 U.S. 279, 293-99 (1987)(unique nature of capital punishment decisions counsels against adopting inference of discriminatory action from statistical disparities indicated by study).

employer the unequivocal right to discharge under certain circumstances." Pet'r Br. 7. To illustrate the supposed split, the Union selected two cases to discuss, *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997), and *Bruce Hardwood Floors v. Southern Council of Industrial Workers*, 8 F.3d 1104 (6th Cir. 1993). Both cases involved the same company and union; however, the contract language at issue in the two cases is substantially different.

The applicable contract language before the sixth circuit allowed the just cause analysis of an arbitrator to include "appropriate mitigating or aggravating circumstances." 8 F.3d at 1108. Additionally, the CBA provided only that an employer "may" discharge an employee for committing one of a list of enumerated offenses. *Id.* The arbitrator, therefore, considered a number of fact-specific mitigating factors in reinstating an employee who had committed a listed offense. The district court found that the arbitrator's award did not draw its essence from the contract, but the sixth circuit disagreed. The court found that the arbitrator made an award consistent with the express contract provision to consider mitigating circumstances as opposed to his own "general considerations of fairness and equity." *Id.* Thus, the precise language contained in the CBA was critical to the sixth circuit's holding.

The CBA considered by the fifth circuit contained no such ambiguities. The CBA required immediate discharge for certain listed offenses, including lying, to which the grievant expressly admitted. 103 F.3d at 452. Although the arbitrator found that the grievant, in fact, lied, he deemed it worthy only of progressive discipline. *Id.* at 451. He nevertheless failed to employ the progressive discipline as outlined in the CBA, instead mandating an arbitrary 10-day suspension for the

grievant. *Id.* The CBA, however, restricted the arbitrator's authority to venture outside the contract by prohibiting him from adding to, amending or departing from the terms of the agreement. *Id.* at 452. The fifth circuit vacated the award because the arbitrator's exaction of his own penalty amounted to a rewriting of the CBA contrary to his authority. *Id.*

Again, no conflict among the circuit courts exists; the apparent differences in the opinions of the fifth and sixth circuits are attributable to the differences in the applicable CBAs. *Bandag* is a decision involving unique facts and contract language in which the courts below properly applied the standard of judicial review enunciated by this Court. The present case is important only to the parties. The unreported decision will not encourage other parties to arbitration to seek to vacate awards involving different facts and different contract language. The circuit court's affirmance of the district courts *vacatur* will not open the floodgates into federal courts. Indeed, as the Union concedes, "only a small number of arbitration awards are appealed to the courts." Pet'r Br. 19.

Nor does the Company believe, as speculated by the Union (Pet'r Br. 22), that arbitrators in the future will abdicate their duty of fidelity to a given contract and camouflage their own notions of industrial justice by either issuing only conclusions, like "grievance upheld," or issuing no opinion at all. Bandag is simply one of those cases in which the arbitrator's decision is not due judicial respect. This Court does not need to repeat or redefine an already clear standard for review of arbitration awards, because those few cases when *Enterprise Wheel* should be applied to vacate awards can be determined by the lower courts.

E. The court has recently denied *certiorari* in similar cases. *Bruce Hardwood Floors v. UBC, Southern*

Council of Indus. Workers, Local Union No. 2713, 103 F.3d 449 (5th Cir.), *cert. denied*, 118 S. Ct. 329 (1997); *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union*, 76 F.3d 606 (4th Cir.), *cert. denied*, 117 S. Ct. 80 (1996). This case raises no new issues. In reality, the Union, disappointed with the results below, simply disagrees with the circuit court's holding. The Court should not grant *certiorari* merely to provide the Union yet another opportunity to plead its case.

CONCLUSION

The Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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February 2, 1998

APPENDIX

URW United Rubber, Cork, Linoleum &
Plastic Workers of America, AFL-CIO,
CLC International Union

rec'd Union 8/9/90

87 South High St.
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[UNION SEAL]

Milan O. Stone, *President*
Joseph H. Johnston, *Vice President*
Kenneth L. Coss, *Secretary-Treasurer*

August 9, 1990

Dear Mr. Huber:

This letter will serve to acknowledge that during 1990 contract negotiations, Bandag and URW Local 922 bargained over the terms of a drug and alcohol testing program. While the parties failed to agree on the terms of a program, it is acknowledged that the negotiations were concluded in good faith and that Bandag has fulfilled its obligations under the National Labor Relations Act to bargain over the matter. It is further acknowledged that during the term of this agreement, Bandag may establish a reasonable work rule dealing with drug/alcohol testing.

Sincerely,

"s/Joseph Coffey"

Joseph Coffey
URW International Rep

JC:clc
opeiu 339

United for Freedom UNION YES [LOGO]